April 29, 1999

William J. Scanlon
Director
Health Financing and
Workforce Issues
U.S. General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Scanlon:

Thank you for the opportunity to comment on the draft of the GAO Report on Uncertainties in Analyses Underlying FDA's Proposed Regulation of Ephedrine Alkaloids in Dietary Supplements. Our comments will address GAO's accurate assessment of FDA's deficient analysis, GAO's conclusion that FDA generally complied with the basic statutory and executive order requirements for rulemaking, and the issue of whether predictable indirect effects should be considered by lawmakers.

First and foremost, the Office of Advocacy would like to express appreciation for the forthright and in-depth assessment of FDA's analysis and scientific evidence in the dietary supplement proposal. GAO concluded that 1) FDA's analysis relied heavily on poorly documented reports of adverse events (AERs),[1] and 2) FDA's analysis of impacts was not transparent and did not fully reflect uncertainties in the underlying data and assumptions. Based on the demonstrable shortcomings of FDA's analysis, GAO is recommending that FDA go back and obtain additional information to support their conclusions before proceeding with a final rule, and also improve the transparency of the cost-benefit analysis in the final rule. These recommendations are reasonable in light of GAO's findings and will result in a more rational (and possibly less burdensome) regulation.

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[1] With regard to AERs, GAO determined that:

- FDA used AERs differently in this rule than in previous rules,;
- the AERs have shortcomings (i.e., they are generally unreliable), and FDA's reliance on them adds uncertainty to the rule;
- the AERs were incomplete and inconsistent;
- FDA relied on AERs for setting dosing limits, but did not determine if these events were caused by Ephedra;
- there is weak support for FDA's proposed duration of use limitation; and
- FDA's estimate of the number and distribution of serious adverse events was poorly documented and could not be confirmed.

Compliance with the Regulatory Flexibility Act

However, the Office of Advocacy finds one aspect of the report to be somewhat troublesome and confusing. Specifically, Advocacy does not understand the theory that an agency can fail to prepare an adequate analysis and, at the same time, comply with the requirements of the Regulatory Flexibility Act (RFA)[2] and other rulemaking requirements. GAO states,

> "We have concerns about the strength of the information upon which FDA based key elements of its proposal. In particular, FDA based its specific dosing level proposal on information associated with only 13 AERs, the quality of these AERs is questionable, and FDA did not establish a causal link between the ingestion of ephedrine alkaloids and the occurrence of these particular adverse events. Further, FDA based its estimate on the benefits of the proposed rule on the annual number of adverse events being reported to FDA prior to this rule. However, FDA did not document which AERs they identified as containing 'serious' events, and therefore, we could not determine the accuracy of FDA's estimated benefits. FDA has no internal guidance on the use of AERs for rulemaking related to foods and dietary supplements and used AERs differently in this proposed rule than in prior rulemaking . . . While FDA's conclusions regarding the desirability of the proposed action may be valid, we believe these conclusions are open to question because of limitations and uncertainties associated with the agency's scientific and economic analyses."

It seems counter-intuitive to suggest that such an inadequate analysis (as described above) could lead to the conclusion that FDA complied with the RFA. The premise of the RFA is to require that agencies consider fully the effects of their rulemaking on small entities. The key requirement of the RFA is the preparation of initial and final regulatory flexibility analyses to accompany, respectively, proposed and final rules that effect small businesses. If the analyses (and the facts/data/science underlying the analysis) do not have to be valid or supportable, then the analyses would be reduced to hollow procedural hoops through which agencies must jump on their way to implementing a rule, and the incentive to have rules based on fact would be eliminated.

The initial regulatory flexibility analysis (IRFA) is supposed to describe the impact of the proposed rule on small entities, the reasons why the action is being considered, its objectives and legal basis, the small entities affected, and significant alternatives to the proposed rule that may reduce burden on small entities while accomplishing the agency's stated objectives. The RFA does not identify specific analytical techniques an agency should use in discussing regulatory alternatives, but there is a guide in section 607 of the RFA that reads, "In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements

[2] 5 U.S.C. § 601 et seq.

if quantification is not practicable or **reliable**." [3] (Emphasis added). It is apparent that the RFA contemplates that agencies should not be guessing or using unreliable data.

Courts have taken the position that the various analyses required by the RFA must be adequate in order for a rule to be in compliance with the RFA. For instance, in *Southern Offshore Fishing Assoc. v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998), the court remanded the RFA determinations of the National Marine Fishery Service (NMFS) with instructions to undertake a rational consideration of the economic effects and potential alternatives to the rule. On the issue of the agency's analysis, the court stated, "The record fails to contain an adequate explanation of the agency's calculation, if any, leaving no possibility to gauge its rationality, which is manifestly suspect."[4] The agency was ordered to redo its analysis and submit it to the court for review. Several months thereafter, dissatisfied with the court ordered RFA analysis, the court rebuked the agency again and appointed a special master to oversee the preparation of a proper RFA analysis.[5]

In this case, there is no way to determine—based on FDA's analysis—whether the benefits of the proposed rule exceed the costs. For instance, the agency never assessed the public health benefits of weight loss associated with the continued sale of the products. Conversely, the agency never assessed the costs to public health associated with putting thousands of distributors out of business. In this regard, the benefits outlined in the proposed rule may be over inflated. Nor did the agency adequately take into account the impact of over reporting that inevitably results from inaccurate publicity about alleged deaths. Over reporting could wipe out the benefits identified by the agency entirely.

The RFA requires public notice and comment on the analysis contained in the proposed rule.[6] In this case, the public cannot comment on vital aspects of the proposed rule because there is no rational basis for the cost-benefit analysis—nor is there transparency. In particular, the public cannot comment on the thirteen AERs on which the dosing limits are based because the public does not even know if the thirteen events were a result of ingesting a dietary supplement containing ephedrine.

The RFA is an outgrowth of the Administrative Procedure Act (APA). Both statutes require transparency and rationality in rulemaking. Failure to adhere to this fundamental requirement could easily be deemed arbitrary and capricious under either statute. There is a mountain of well-established case law that says the APA requires agencies to issue rational rules.[7] To determine whether the results of informal rulemaking meet that standard, the rulemaking record must support the factual conclusions underlying the rule, the policy determinations undergirding the rule must be rational, and the agency must

[3] 5 U.S.C. § 607.
[4] *Southern Offshore Fishing* at 1435.
[5] Order of Judge Steven D. Merryday Granting Plaintiff's Request for Special Master, *Southern Offshore Fishing*, (No. 97-1134-CIV-T-23C) (Oct. 16, 1998).
[6] 5 U.S.C. § 603(a).
[7] *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983); *See Bowen v. American Hospital Association*, 476 U.S. 610, 643-45 (1986).

adequately explain its conclusions.[8] FDA's rule is insufficiently transparent to determine if the three-prong test has been met.

Direct vs. Indirect Effects

The issue of whether an agency is required to prepare an analysis pursuant to the RFA when the impact is indirect (as opposed to direct) has been problematic. The Office of Advocacy is painfully aware of the court decisions stemming *from Mid-Tex Electric Cooperative, Inc. v. FERC*[9] that seem to state that agencies need not prepare an RFA analysis if the effects on an industry are indirect. Frankly, in spite of the dicta contained in *Mid-Tex*, the Office of Advocacy believes that the opposite is or should be the case. In any event, there is no law that says FDA must be constrained to agree with another agency's interpretation of the RFA—especially when there are such serious policy implications associated with putting thousands of legitimate businesses out of business.

It is difficult to fathom that destroying an entire industry by regulation is an indirect effect. In order to "comply" with FDA's rule, the industry would have to redirect its marketing strategies and materials if they were to remain in business. Even so, the quantities being sold would be severely reduced so as to eliminate profitability. The argument here is that some indirect effects are more indirect than others. Sometimes it is impossible to calculate every effect of a regulation. However, in this particular instance, the effects are grave and foreseeable. In fact, FDA acknowledged the foreseeability of the impacts in its proposed rule.

Finally, the Office of Advocacy is not aware of any comparable case law with respect to direct and indirect effects as it applies to Executive Order 12866. The executive order requires a cost-benefit analysis of all economically significant regulations and apparently does not distinguish between direct and indirect effects.[10] As such, the agency should have prepared an analysis of the impact on distributors of dietary supplements pursuant to

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[8] *McGregor Printing Corp. v. Kemp*, 20 F.3d 1188, 1194 (D.C. Cir. 1994).

[9] 773 F.2d 327 (D.C. Cir. 1985). The court in *Mid-Tex* examined a challenge to a rule promulgated by the Federal Energy Regulatory Commission (FERC) that allowed public utilities to include current construction expenses in their rate bases. FERC maintained that the rule directly affected large public utilities only, and, as a result, would not have a significant impact on small entities. The agency, therefore, did not prepare a regulatory flexibility analysis. The challengers contended that the rule would raise electric rates and thereby adversely affect numerous small entities. In support of their contention, opponents cited statements by Senator Culver (one of the main sponsors of the Act) that both the direct and indirect effects of a rule must be considered as part of the analysis. *See* 126 CONG. REC. 21,558-59 (1980). The court disagreed with the challengers' interpretation of the RFA's legislative history and held that congressional intent with respect to the analysis of indirect effects was ambiguous.

[10] The executive order states that "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." In addition, the executive order states, "`Significant regulatory action' means any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, the environment, public health or safety, or state, local, or tribal governments or communities…" Exec. Order No. 12866, 58 Fed. Reg. 51735 (1993), *reprinted in* 5 U.S.C. § 601.

the executive order. The executive order analysis would surely have satisfied the requirements of the RFA in spite of the controversy about indirect effects and the RFA.

In summary, the requirement for justifying a rule (iterated in the RFA, APA and Executive Order 12866) and the requirement to comply with the RFA and its analytical components cannot be compartmentalized--separating the two presents a legal conundrum. As the agency vested with sole responsibility for monitoring agency compliance with the RFA, Advocacy felt obliged to raise the issue. As for the issue of indirect effects, Advocacy believes its interpretation accords better treatment of the intent and purpose of the RFA.

Given the uncertainty surrounding the analysis of the dietary supplement proposal, a better alternative in the near term may be to allow states to regulate (as in Ohio) or to promulgate voluntary guidelines. Short of these recommendations, the Office of Advocacy concurs with GAO's recommendation to reanalyze the impacts of the proposed rule.

Again, we wish to express our gratitude for this opportunity to comment. Please do not hesitate to contact us directly if you have any questions at 202-205-6533.

Sincerely,

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